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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC-02-162-53281

Office: Vermont Service Center

Date: FEB 05 2003

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tennis club with 25 employees. It seeks to employ the beneficiary as a tennis professional for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher *in a specific specialty*, or its equivalent, as a minimum for entry into the occupation in the United States.

(Emphasis added.) The director determined the petitioner had not established that a baccalaureate degree in a specific specialty was the normal minimum requirement for entry into the occupation.

On appeal, counsel asserts that the denial of the petition is an abuse of discretion. Specifically, counsel asserts that the director based his denial on the petitioner's failure to provide a detailed statement of the beneficiary's proposed duties as requested in Service correspondence dated April 23, 2002. Counsel asserts that the petitioner has submitted sufficient evidence to show that it requires a baccalaureate degree in a specific specialty for the proffered position and also that the requirement of a baccalaureate degree in a specific specialty is standard to

the industry in parallel positions among similar organizations. Counsel further asserts that the position in question requires the theoretical and practical application of a body of highly specialized knowledge. Finally, counsel states that the Service has previously approved other H-1B petitions filed by the petitioner for similar positions.

When determining whether a particular job qualifies as a specialty occupation, the Service considers the specific duties of the offered position combined with the nature of the petitioning entity's business operations. On the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Instruct juniors and adults in clinics and private lessons; participate in exhibitions, evaluate clients for placement, organize and coordinate tournaments, and assist customers with equipment needs.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The regulatory definition of "specialty occupation," moreover, makes it clear that the baccalaureate degree referred to in section 214.2(h)(4)(iii)(A) must be "in a specific specialty." 8 C.F.R. § 214.2(h)(4)(ii). That is to say, if a baccalaureate degree in any field at all will satisfy the requirements of the position, the position is not in a specialty occupation. The petitioner has not met the requirements specified in 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A). Thus, the petitioner has failed to establish that the offered position qualifies as a specialty occupation.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with counsel's argument that the proffered position would normally require a baccalaureate degree in a specific specialty. The position appears to combine the duties of a coach with those of a sports instructor. The Department of Labor (DOL) describes the duties of sports instructors and coaches at page 126 of the *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, as follows:

Coaches organize, instruct, and teach amateur and professional athletes in fundamentals of individual and team sports. In individual sports, *instructors* may often fill this role. Coaches train athletes for competition by holding practice sessions to perform drills and improve the athlete's skills and conditioning. Using their expertise in the sport, coaches instruct the athlete on proper form and technique in beginning and later in advanced exercises attempting to maximize the players potential. Along with overseeing athletes as they refine their skills, coaches also are responsible for managing the team during both practice sessions and competitions. They may also select, store, issue, and inventory equipment, materials, and supplies.

Sports instructors teach professional and nonprofessional athletes on an individual basis. They organize, instruct, train, and lead athletes of indoor and outdoor sports such as bowling, tennis, golf, and swimming. . . Like a coach, sports instructors may also hold daily practice sessions and be responsible for any needed equipment and supplies. Using their knowledge of their sport, physiology, and corrective techniques, they determine the type and level of difficulty of exercises, prescribe specific drills, and relentlessly correct individuals' techniques.

A review of the *Handbook* at page 128 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a sports instructor or as a coach. Regardless of the sport or occupation, these jobs require considerable overall knowledge of the game, usually acquired through years of experience at lower levels. A general baccalaureate degree is required for coaches and sports instructors in schools but there is no indication that a degree in a specific specialty is required. Additionally, coaches and sports instructors must relate well to others and possess good communication and leadership skills.

Second, the petitioner did not present persuasive evidence that the degree requirement is an industry standard. The record contains

four letters from officials of other tennis clubs. Joette Smythe, Club Manager of Kings Highway Tennis Club, states:

We require our Tennis Professionals and Training Directors to have competed in World Class competitions. We also require our professionals to hold, at minimum, a baccalaureate degree. This letter requirement is the Industry standard for Fairfield County, due, in part, to the upscale nature of the area.

██████████ provided a list of the tennis professionals currently employed by Kings Highway Tennis Club. One of these individuals holds a Master's degree in physical education; one has completed college-level education in marketing; one holds a bachelor's degree in sociology; one holds a bachelor's degree in psychology; one holds a bachelor's degree in computer engineering; and two are described as having the equivalent of a four-year degree. While most of this club's tennis professionals have a bachelor's degree, only one of these individuals holds a degree in a specific specialty. It appears that Kings Highway Tennis Club requires that its tennis professionals have a bachelor's degree or the equivalent, but there is no indication in ██████████ letter that the degree must be in a specific specialty.

Virginia Dragone, Club Manager of Trumbull Racquet Club, Inc., states:

Our minimum educational requirement for a Tennis Instructor is a 2-year degree or equivalent. In all cases, we require experience in world-class competition.

Clearly, this tennis club does not even require a baccalaureate degree for its tennis instructor positions.

Barbara Cavaliere, Club Manager of Shippan Racquet Club, Inc., states in pertinent part:

At minimum our Tennis Professionals must hold a baccalaureate degree and have competed in World-Class competitions... . The educational requirement is fairly standard in the industry in Fairfield County....

██████████ provides a list of her club's tennis professionals and their level of education. Seven of the club's nine tennis professionals have bachelor's degrees. One holds a bachelor's degree in merchandising and one holds a bachelor's degree in psychology. ██████████ does not provide the area of specialization of the other five individuals. The two remaining tennis instructors have, respectively, three years of college and a "4-year equivalency." It appears that this tennis club does not

require that its tennis professionals have bachelor's degrees in a specific specialty.

Beth McPadden, Club Manager of Fairfield Indoor Tennis, Inc., states:

We insist that our Tennis Professionals have, at minimum, a baccalaureate degree and experience in world-class competition. Occasionally, we will accept a person with an Associates degree if that individual is an exceptional talent and/or has distinguished him/herself in the sport either as a player or coach.

[REDACTED] provided a list of her club's tennis professionals and their level of education. All six of the club's tennis professionals have a bachelor's degree, but [REDACTED] has not provided any information regarding the area of specialization. The tennis instructor holds an associate degree. Again, this club apparently requires that its tennis professionals have a bachelor's degree, but does not require that the degree be in a specific and related specialty. The petitioner has shown that other tennis clubs in the Fairfield, Connecticut area usually require that their tennis professionals have bachelor's degrees or the equivalent, but the evidence of record does not show that these clubs require baccalaureate degrees in a specific and related specialty. Thus, the petitioner has not shown that the degree requirement is common to the industry in parallel positions among similar organizations.

[REDACTED] General Manager of Beaver Brook Tennis Club, states in a letter dated April 26, 2002:

we have not now, or ever for that matter, hired a Tennis Professional who lacked a degree, either from the United States or from his country of origin. This is truly a requirement for being hired at this level.

[REDACTED] provided a list of his club's current tennis professionals and their level of education. One of these individuals holds a bachelor's degree in Spanish; one holds a master's degree in business administration; one holds a bachelor's degree in music; one holds a bachelor's degree in physical education; and one holds a bachelor's degree in business with a specialization in marketing. While the petitioner apparently requires that its tennis professionals have a bachelor's degree or its equivalent, it clearly does not require that the degree be in a specific and related specialty.

Counsel argues that some tennis professionals have degrees related to the specific nature of their duties. For example, counsel states that a degree in business or marketing can be required for a tennis professional whose job involves more marketing than

others, or a degree in Spanish may be required for some tennis professionals who are required to deal with Hispanic students. Counsel has not, however, provided any independent evidence to corroborate his assertion. The unsupported assertions of counsel do not constitute evidence. *Matter of Laureano* 19 I&N Dec. 1 (BIA 1983), *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) and *Matter of Ramirez-Sanchez*, 17 I&N Dec. 530 (BIA 1980). As such, the petitioner has not persuasively shown that it requires a bachelor's degree in a specific specialty for the position being offered to the beneficiary.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The duties of this position do not appear to be any more specialized or complex than those normally performed by coaches or sports instructors. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specific specialty is the normal minimum requirement for employment as a coach or sports instructor.

The Service acknowledges counsel's statement that the director did not request a detailed statement of the beneficiary's proposed duties in his request for evidence dated April 23, 2002. While counsel is correct in stating that the director did not specifically request a detailed description of the proffered position, the petitioner was requested to submit additional evidence to establish that the proffered position is a specialty occupation. Implicit in such a request was the director's determination that the job description of the proffered position was not sufficiently detailed. Accordingly, the director followed the provisions of 8 C.F.R. § 103.2(b)(8).

The Service notes that the director did not deny the petition based on the petitioner's failure to submit a detailed description of the job's duties. The director correctly denied the petition based on a finding that the petitioner had not persuasively shown that it required a baccalaureate degree in a specific specialty for the proffered position; that the degree requirement is standard to the industry in parallel positions among similar organizations; that the petitioner normally requires a baccalaureate degree or its equivalent for the proffered position; or that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree in a specific specialty. Despite counsel's claim to the contrary, the director adhered to 8 C.F.R. § 103.3(a)(1)(i) and stated the specific reasons for denial. Counsel had an opportunity, on appeal, to submit any additional evidence he

deemed necessary to show that the proffered position is a specialty occupation; however, counsel has failed to do so.

Counsel asserts that the Service has already determined that the proffered position is a specialty occupation and the beneficiary qualifies to perform services in a specialty occupation since the Service had approved previous petitions filed on behalf of other aliens by this petitioner. On appeal, counsel submits a copy of a Form I-797 for the approval of an H-1B petition filed by Mystic Indoor Tennis in behalf of Paul Fairchild. Counsel does not state the relevance of this evidence to the instant petition; however, the Service presumes that the Form I-797 relates to an H-1B petition that was approved for a tennis instructor at another tennis club in Connecticut.

The director's decision does not indicate whether he reviewed the prior approvals, and this record of proceeding does not contain a copy of the previous petitions and their supporting documentation, including the petition relating to Mystic Indoor Tennis. If the prior petitions were approved based on evidence that is substantially similar to the evidence contained in this record of proceeding, however, the approvals of the prior petitions would have been an error. The Service is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the Service nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

It is important to note the relationship between the AAO and the Vermont Service Center. The Vermont Service Center has authority to decide H-1B petitions in the first instance. 8 C.F.R. § 214.2 (h)(2)(i)(A). The AAO, by contrast, is the appellate body that considers cases under the appellate jurisdiction of the Associate Commissioner for Examinations. 8 C.F.R. § 103.3(a)(1)(iv). The AAO has jurisdiction over appeals from denials of H-1B visa petitions. 8 C.F.R. § 103.1(f)(3)(iii)(J). It is for the AAO to overrule, modify or authoritatively distinguish a prior precedent. Thus, the relationship between the AAO and a service center is analogous to the relationship between a United States Court of Appeals for a particular circuit and a United States District Court for a district within the territory of that circuit.

By designating an AAO decision as a precedent, the Commissioner can bind all service center and district directors to follow the reasoning of the decision. 8 C.F.R. § 103.3(c). However, the AAO is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d

800, 803 (E.D. La. 2000), *aff'd* 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Indeed, the AAO could not exercise the error-correcting function that is central to its appellate jurisdiction, if, when an issue first came before the AAO, the AAO were bound by a service center or district director's decision. The AAO may not even be aware of a decision of a district director or service center director unless the underlying application or petition is denied and the matter is appealed to the AAO. Such an assertion would be akin to saying that, when an issue comes before a United States Court of Appeals for the first time, the Court of Appeals would be bound by a decision of a United States District Court, even though the Court of Appeals has jurisdiction to reverse the district court.

The petitioner has failed to establish that any of the four factors enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A) are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.